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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JILBRAUN DANDTON AGNEW, ) Civil No. 11cv00757 RBB  
12 )  
13 ) Petitioner, ) **ORDER DENYING PETITIONER'S**  
14 ) **SECOND MOTION FOR APPOINTMENT**  
15 ) **OF COUNSEL [ECF NO. 15]**  
16 )  
17 ) v. )  
18 )  
19 ) MATTHEW CATE, et al., )  
20 )  
21 ) Respondent. )  
22 )  
23 )

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17 Petitioner Jilbraun Dandton Agnew, a state prisoner proceeding  
18 pro se and in forma pauperis, filed a Petition for Writ of Habeas  
19 Corpus on April 11, 2011 [ECF Nos. 1, 3].<sup>1</sup> Agnew contends that  
20 during his jury trial, the prosecutor improperly questioned  
21 witnesses about evidence that the trial judge had previously ruled  
22 was inadmissible. (See Pet. 6-9, ECF No. 1.) Respondent Matthew  
23 Cate<sup>2</sup> filed an Answer to Petition for Writ of Habeas Corpus on July

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25 <sup>1</sup> Because Agnew's Petition is not consecutively paginated,  
the Court will cite to it using the page numbers assigned by the  
electronic case filing system.

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27 <sup>2</sup> The Petitioner originally named "Hedgepath (Warden)" as the  
respondent. (Pet. 1, ECF No. 1.) On April 22, 2011, United States  
28 District Court Judge Barry Ted Moskowitz issued an order, in part,  
substituting Matthew Cate as Respondent in place of Hedgepath.  
(Order Granting Appl. Proceeding in Forma Pauperis 1 n.1, ECF No.  
3.)

1 27, 2011 [ECF No. 12]. After the parties consented to magistrate  
2 judge jurisdiction, Judge Moskowitz referred the matter to this  
3 Court [ECF Nos. 9, 13]. Petitioner's Reply to Respondent's Answer  
4 to the Petition for Writ of Habeas Corpus was filed on August 25,  
5 2011, which the Court construes as his Traverse [ECF No. 17].

6 Agnew's first Motion for Appointment of Counsel was filed nunc  
7 pro tunc to July 26, 2011 [ECF No. 11]. There, Petitioner argued  
8 that the issues in the case are particularly complex. (Mot.  
9 Appointment Counsel 1, July 26, 2011, ECF No. 11.) Agnew contended  
10 that the complex issues include prosecutorial misconduct, the  
11 admission of evidence that was previously deemed inadmissible, and  
12 the trial court's error in allowing the prosecutor to ask questions  
13 about other instances of Agnew's alleged misconduct. (Id.) He  
14 also alleged that the interests of justice require an appointed  
15 attorney in light of the length of his sentence. (Id.) This Court  
16 denied Agnew's request for court-appointed representation on August  
17 10, 2011 [ECF No. 14].

18 The Petitioner's second Motion for Appointment of Counsel was  
19 filed on August 8, 2011 [ECF No. 15],<sup>3</sup> followed by his prisoner  
20 trust fund account statement [ECF No. 16]. In support of his  
21 second request, Agnew urges that he is unable to afford an attorney  
22 because he does not have assets. (Mot. Appointment Counsel 1, Aug.  
23 8, 2011, ECF No. 15.) He is incarcerated at Salinas Valley State  
24 Prison, and he is unable to obtain adequate employment to afford  
25 legal representation. (Id.) Next, Petitioner maintains that the  
26 issues involved in this action are complex, and it is difficult for  
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28 <sup>3</sup> The second Motion was not entered on the case docket,  
however, until after the Court's August 10, 2011 Order was entered.

1 him to understand legal terms and authority. (Id. at 1-2.) Agnew  
 2 found Respondent's Answer difficult to understand. (Id. at 2.) He  
 3 further submits that he has a reading level of an eighth grader and  
 4 that he received assistance from other inmates when filing his  
 5 Petition. (Id.) Finally, Petitioner alleges that he has limited  
 6 access to the law library due to prison lock downs and his  
 7 education schedule. (Id.)

8       The Sixth Amendment right to counsel does not extend to  
 9 federal habeas corpus actions by state prisoners. McCleskey v.  
 10 Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis, 801 F.2d 1191,  
 11 1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th  
 12 Cir. 1986). Nonetheless, financially eligible habeas petitioners  
 13 seeking relief pursuant to 28 U.S.C. § 2254 may obtain  
 14 representation whenever "the court determines that the interests of  
 15 justice so require . . . ." 18 U.S.C.A. § 3006A(a)(2)(B) (West  
 16 Supp. 2011); Terrovona v. Kincheloe, 912 F.2d 1176, 1181-82 (9th  
 17 Cir. 1990); Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir. 1984);  
 18 see Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994). The  
 19 interests of justice require an appointed lawyer when the court  
 20 conducts an evidentiary hearing on the petition. Rule 8(c), 28  
 21 U.S.C. foll. § 2254; Terrovona, 912 F.2d at 1181; Knaubert, 791  
 22 F.2d at 728; see Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir.  
 23 1994). Otherwise, whether to appoint an attorney is entirely  
 24 within the discretion of the district court. Knaubert, 791 F.2d at  
 25 728.

26       "Indigent state prisoners applying for habeas relief are not  
 27 entitled to appointed counsel unless the circumstances of a  
 28 particular case indicate that appointed counsel is necessary to

1 prevent due process violations." Chaney, 801 F.2d at 1196; see  
2 Knaubert, 791 F.2d at 728-29. A due process violation may occur if  
3 the issues involved are too complex for the petitioner to manage  
4 without the assistance of an attorney. The appointment of counsel  
5 may also be necessary if the petitioner has limited education and  
6 is incapable of presenting the claims in the petition. Hawkins v.  
7 Bennett, 423 F.2d 948, 950 (8th Cir. 1970). "[A] district court  
8 should consider the legal complexity of the case, the factual  
9 complexity of the case, the petitioner's ability to investigate and  
10 present his claim, and any other relevant factors." Abdullah, 18  
11 F.3d at 573.

12 Because these factors are useful in determining whether due  
13 process requires court-appointed counsel, they are considered to  
14 the extent possible based on the record before the Court.  
15 Petitioner contends that he is unable to afford legal  
16 representation, as he is "without stocks, bonds, or real estate,  
17 nor any typ[e] of saving[s] accounts." (Mot. Appointment Counsel  
18 1, Aug. 8, 2011, ECF No. 15.) Also, his incarceration prevents him  
19 from securing adequate employment. (Id.) Yet, as discussed  
20 previously, even indigent state prisoners seeking habeas relief are  
21 not entitled to a court-appointed attorney unless the circumstances  
22 indicate that counsel is necessary to prevent due process  
23 violations. Chaney, 801 F.2d at 1196; Knaubert, 791 F.2d at 728-  
24 29. Indigence alone does not rise to this level.

25 Next, the Petitioner argues that this action involves complex  
26 legal issues, and he has had difficulty understanding legal terms  
27 as well as the Respondent's Answer. (Mot. Appointment Counsel 1-2,  
28 Aug. 8, 2011, ECF No. 15.) But despite this contention, Agnew has

1 adequately represented himself to date. He has prepared and filed  
2 a sixteen-page Petition for Writ of Habeas Corpus with thirty-three  
3 pages of exhibits [ECF No. 1], a motion to proceed in forma  
4 pauperis [ECF No. 2], two motions seeking court-appointed counsel  
5 [ECF Nos. 11, 15], his prisoner trust fund account statement [ECF  
6 No. 16], and an eighteen-page Traverse [ECF No. 17]. The  
7 Petitioner filed these documents within a period that spanned less  
8 than five months. Agnew's Petition was pleaded sufficiently for  
9 this Court to direct Respondent to file an answer or other  
10 responsive pleading to the Petition [ECF No. 4]. The Traverse is  
11 similarly pleaded adequately.

12 It appears that Petitioner has a good understanding of this  
13 action and the legal issues involved. (See Pet. 6-9, ECF No. 1.)  
14 The Petition contains a recitation of relevant facts as well as  
15 legal arguments with citations to case law and other supporting  
16 authority. (See id.) Based on the detail and clarity of the  
17 initial pleading, Agnew has competently presented his claims. He  
18 has not pointed to any particular circumstances that would make the  
19 appointment of counsel necessary at this time. See Bashor, 730  
20 F.2d at 1234 (denying request for appointment of counsel where  
21 petitioner thoroughly presented the issues in his petition and  
22 memorandum of law). Moreover, "[t]he procedures employed by the  
23 federal courts are highly protective of a pro se petitioner's  
24 rights. The district court is required to construe a pro se  
25 petition more liberally than it would construe a petition drafted  
26 by counsel." Knaubert, 791 F.2d at 729; see Bashor, 730 F.2d at  
27 1234. At this stage of the proceedings, the interests of justice  
28 do not require the Court to appoint an attorney.

1        "Where the issues involved can be properly resolved on the  
2 basis of the state court record, a district court does not abuse  
3 its discretion in denying a request for court-appointed counsel."  
4 Hoggard, 29 F.3d at 471; McCann v. Armontrout, 973 F.2d 655, 661  
5 (8th Cir. 1992); Travis v. Lockhart, 787 F.2d 409, 411 (9th Cir.  
6 1986). In this case, the Petitioner maintains that the prosecutor  
7 committed prejudicial misconduct during the jury trial by asking  
8 witnesses questions about whether Petitioner had punched a woman in  
9 an unrelated incident, which was evidence that the trial judge had  
10 previously ruled was inadmissible. (Pet. 6-9, ECF No. 1.) Also,  
11 Agnew submits that the trial court erred in allowing the prosecutor  
12 to ask witnesses questions about Agnew's other purported  
13 misconduct. (Id. at 6.) The Court has been provided with all  
14 relevant documents and transcripts to properly resolve the  
15 allegations in the Petition on the basis of the record. (See  
16 Answer Attach. #1 Notice Lodgment 1-2, ECF No. 12); Hoggard, 29  
17 F.3d at 471; McCann, 973 F.2d at 661; Travis, 787 F.2d at 411.

18        Finally, Petitioner asserts that he is entitled to an  
19 appointed lawyer because he has limited access to the law library  
20 due to his "education schedule" and random prison lock downs.  
21 (Mot. Appointment Counsel 2, Aug. 8, 2011, ECF No. 15.) Even so,  
22 Agnew does not allege that he lacks reasonable access to the law  
23 library, and this does not establish that the interests of justice  
24 require the appointment of counsel.

25        Indeed, the assistance that a lawyer provides a petitioner is  
26 valuable. "An attorney may narrow the issues and elicit relevant  
27 information from his or her client. An attorney may highlight the  
28 record and present to the court a reasoned analysis of the

1 controlling law." Knaubert, 791 F.2d at 729. Nonetheless,  
2 "[u]nless an evidentiary hearing is held, an attorney's skill in  
3 developing and presenting new evidence is largely superfluous; the  
4 district court is entitled to rely on the state court record  
5 alone." Id. (citing Sumner v. Mata, 449 U.S. 539, 545-57 (1981);  
6 28 U.S.C. § 2254(d)). If a court denies a petitioner's request for  
7 appointment of counsel, the court will draw an independent legal  
8 conclusion after informing itself of the relevant law. Id.  
9 "Therefore, the additional assistance provided by attorneys, while  
10 significant, is not compelling." Id.

11 When a self-represented petitioner presents a claim that the  
12 state court made an unreasonable determination of the facts, the  
13 district court may exercise its discretion to hold an evidentiary  
14 hearing. Id. at n.6. In that circumstance, counsel must be  
15 appointed to a petitioner who qualifies under 18 U.S.C.  
16 § 3006A(a)(2)(B). Id.; see Rule 8(c), 28 U.S.C.A. foll. § 2254;  
17 Wood v. Wainwright, 597 F.2d 1054 (5th Cir. 1979). Courts may also  
18 appoint an attorney for the effective utilization of any discovery  
19 process. Rule 6(a), 28 U.S.C.A. foll. § 2254. An evidentiary  
20 hearing has not been ordered, and at this time, it does not appear  
21 that discovery will be necessary.

22 For the reasons stated above, the interests of justice do not  
23 compel the appointment of counsel to represent Agnew at this stage

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1 of the proceedings. Petitioner's second Motion for Appointment of  
2 Counsel is **DENIED** without prejudice.

3 **IT IS SO ORDERED.**

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5 DATED: October 5, 2011

  
Ruben B. Brooks  
United States Magistrate Judge

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7 cc: All parties  
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